

FILED/ACCEPTED

APR - 2 2007

Federal Communications Commission
Office of the Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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MAR 30 2007

Federal Communications Commission
Bureau / Office

In Re Application of)
)
MCELROY ELECTRONICS CORPORATION)
)
For Authorization to Construct and Operate)
A Nationwide Wireless Broadband Network)
in the 2155-2175 MHz Band)

File No.
WT Docket No. 07-16

To: Managing Director & Chief,
Wireless Telecommunications Bureau

PETITION FOR RECONSIDERATION

McElroy Electronics Corporation ("MEC"), by its attorney, and pursuant to § 405(a) of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. § 405(a), and § 1.106(a)(1) of the Commission's Rules ("Rules"), 47 C.F.R. § 1.106(a)(1), hereby requests reconsideration of the action of the Commission's Financial Operations Office returning MEC's above-captioned application. See Letter of Financial Operations Office to Lukas, Nace, Gutierrez & Sachs (Mar. 6, 2007) ("Return Letter"). In support thereof, the following is respectfully submitted:

On January 31, 2007, the Wireless Telecommunications Bureau ("WTB") released a public notice announcing that it had accepted for filing the application of M2Z Networks, Inc. ("M2Z") for authorization to provide a national "Broadband Radio Service" using frequencies in the 2155-2175 MHz band. *WTB Announces that M2Z Networks, Inc.'s Application for License and Authority to Provide a National Broadband Radio Service in the 2155-2175 MHz Band Is Accepted for Filing*, DA 07-492, at 1 (WTB Jan. 31, 2007) ("*M2Z Acceptance PN*"). The WTB accepted M2Z's application for filing in WT Docket No. 07-16 pursuant to the Commission's "general statutory authority" under § 309 of the Act, 47 U.S.C. § 309, "rather than pursuant to an

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established framework of processing rules.” *M2Z Acceptance PN*, at 1. See *WTB Sets Pleading Cycle for Application by M2Z Networks, Inc. to Be Licensed in the 2155-2175 MHz Band*, DA 07-987, at 1 (WTB Mar. 9, 2007) (“*M2Z Procedures PN*”). In Block 1 of its FCC Form 601, M2Z gave the radio service code “BR” for “Broadband Radio Service.” See *infra* Attachment 1, at 1.

By accepting M2Z’s application pursuant to the Commission’s authority under § 309 of the Act, instead of applying its processing rules, the WTB effectively waived the Part 1 and Part 27 licensing rules for applicants filing competing applications in WT Docket 07-16. See *M2Z Acceptance PN*, at 1. To ensure that its application would be deemed acceptable for filing under the Commission’s general statutory authority that had been applied to M2Z, MEC closely followed how M2Z completed its FCC Form 601. Like M2Z, MEC entered the BR radio service code in Block 1 of the Form 601. Before doing so, MEC contacted a member of the WTB staff, who confirmed that the BR radio service code was the appropriate code to use.

When it accepted M2Z’s application for filing, the WTB announced that “additional applications may be filed using the Commission’s Electronic Filing System (ECFS) or by filing paper copies.” *M2Z PN*, at 2. In reliance on the WTB’s public announcement, MEC filed the subject application both by using the ECFS and by filing paper copies (with the Commission’s filing fee) at the Commission’s office in Pittsburgh, Pennsylvania. See *infra* Attachment 2. The WTB subsequently noted that MEC’s application had been filed in WT Docket 07-16. See *M2Z Procedures PN*, at 2 n.10.

On March 6, 2007, the Financial Operations Office returned MEC’s application claiming that BR is not a valid radio service code except when an applicant is seeking special temporary authorization (“STA”) or requesting a rule waiver. See *Return Letter*, at 1. MEC respectfully

suggests that it used a valid radio service code and that the Financial Operations Office erred when it determined otherwise.

The WTB gave notice in 2005 that BR was a valid radio service code. *See WTB Announces Changes to the ULS to Accommodate the Broadband Radio Service and Educational Broadband Service and Reminds Licensees that Use of ULS Forms and Elertronic Filing for these Services Become Mandator?, on July 11, 2005, 20 FCC Rcd 11554, 11556-59 (WTB 2005) (“BRS/EBS PN”)*. Moreover, BR is listed as the valid radio service code for the Broadband Radio Service in the instructions for the FCC Form 601. *See FCC 601 Main Form Information and Instructions, at 7 (Nov. 2006)*. Consequently, all the competing applicants for the 2155-2175 MHz band authorization - - M2Z, MEC, NetfreeUS, LLC, NextWave Broadband Inc., Commnet Wireless, LLC, Open Range Communications, Inc., and TowerStream Corporation - - entered the BR code in Block 1 of their Form 601.

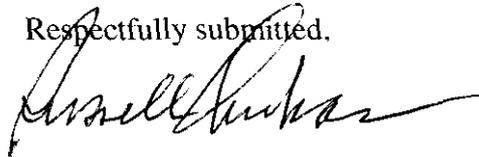
In 2005, the WTB announced that the Commission was not accepting applications for new geographic licenses in the Broadhand Radio Service. *See BRS/EBS PN, 20 FCC Rcd at 11559*. But that announcement was effectively superceded by the *M2Z Acceptance PN* which gave notice that M2Z’s application for a nationwide license in the Broadband Radio Service had been accepted for filing. MEC’s subsequent filing was equally acceptable under the *M2Z Acceptance PN*.

Assuming *arguendo* that the BR code could not be employed in the usual case, it nevertheless could be employed here. The Commission's normal application processing rules do not apply to applications filed in WT Docket 07-16 pursuant to the *M2Z Acceptance PN*. M2Z entered BR in Block 1 of its Form 601 and its application was deemed acceptable for filing under § 309 of the Act. MEC did the same and expressly asked for the same treatment the WTB

afforded M2Z. *See* MEC's FCC Form 601, E%1, at 2-3. Under these circumstances, to reject MEC's application soon after accepting M2Z's application runs afoul of the *Melody Music* doctrine under which the Commission must treat similarly-situated parties alike. *See Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1987. *See also McElroy Electronics Corp. v. FCC*, 990 F.2d 1351, 1365 (D.C. Cir. 1993) ("we remind the Commission of the importance of treating similarly situated parties alike or providing an adequate justification for disparate treatment")

For all the foregoing reasons, MEC respectfully requests that its application be accepted for filing *nuncpro tunc* as of March 2, 2007 pursuant to the Commission's authority under § 309 of the Act or, in the alternative, that an adequate justification be provided for rejecting its application after accepting M2Z's application.

Respectfully submitted,



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March 30, 2007

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March 2, 2007

Federal Communications Commission
Wireless Bureau Applications
P.O. Box 358130
Pittsburgh, PA 15251-5130

**Re: McElroy Electronics Corporation
Application for a Nationwide 2155-2175 MHz Band Authorization
WT Docket No. 07-16**

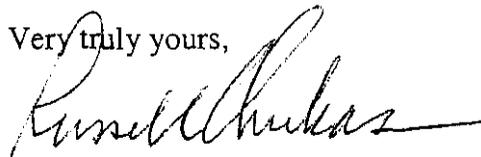
Dear Sir or Madam:

Transmitted herewith on behalf of McElroy Electronics Corporation, and in accordance with the Commission's Public Notice, DA 07-492, released January 31, 2007, are the original and two (2) copies of its application (FCC Form 601) for authorization to construct and operate a nationwide broadband wireless system in the 2155-2175 MHz frequency band. Also enclosed are an FCC Form 159 and the required filing fee.

This application is also being filed using the Commission's Electronic Comment Filing System for consideration in WT Docket No. 07-16.

If there are any questions regarding this submission, please contact the undersigned.

Very truly yours,



Russell D. Lukas

Enclosures

FCC 601
Main Form

**FCC Application for Wireless Telecommunications Bureau
Radio Service Authorization**

Approved by OMB
3060 - 0798
See instructions for
public burden estimate

I) Radio Service Code:	1a) Existing Radio Service Code:

General Information

2) (Select only one) (<u>NE</u>)	
NE - New	RD - Renewal Only
MD - Modification	RM - Renewal/Modification
AM - Amendment	CA - Cancellation of License
AU - Administrative Update	WD - Withdrawal of Application
DU - Duplicate License	NT - Required Notifications
	EX - Requests for Extension of Time
	RL - Registered Location/Link
3a) If this application is for a <u>Developmental License</u> , <u>Demonstration License</u> , or a <u>Special Temporary Authorization (STA)</u> , enter the code and attach the required exhibit as described in the instructions. Otherwise enter 'N' (Not Applicable).	(<u>N</u>) <u>D</u> <u>M</u> <u>S</u> <u>N/A</u>
3b) If this application is for Special Temporary Authority due to an emergency situation, enter 'Y'; otherwise enter 'N'. Refer to Rule 1.915 for an explanation of situations considered to be an emergency.	() <u>Yes</u> <u>No</u>
4) If this application is for an Amendment or Withdrawal, enter the file number of the pending application currently on file with the FCC.	File Number
5) If this application is for a Modification, Renewal Only, Renewal/Modification, Cancellation of License, Duplicate License, or Administrative Update, enter the call sign of the existing FCC license. If this is a request for Registered Location/Link, enter the FCC call sign assigned to the geographic license.	Call Sign
6) If this application is for a New, Amendment, Renewal Only, or Renewal/Modification, enter the requested authorization expiration date (this item is optional).	MM DD /
7) Is this application "major" as defined in §1.929 of the Commission's Rules when read in conjunction with the applicable radio service rules found in Parts 22 and 90 of the Commission's Rules? (NOTE: This question only applies to certain site-specific applications. See the instructions for applicability and full text of §1.929).	() <u>Yes</u> <u>No</u>
8) Are attachments (other than associated schedules) being filed with this application?	(<u>Y</u>) <u>Yes</u> <u>No</u>

Fees, Waivers, and Exemptions

9) Is the Applicant exempt from FCC application fees?	(<u>N</u>) <u>Yes</u> <u>No</u>
10) Is the Applicant exempt from FCC regulatory fees?	(<u>N</u>) <u>Yes</u> <u>No</u>
11a) Does this application include a request for a Waiver of the Commission's Rule(s)? If 'Yes', attach an exhibit providing rule number(s) and explaining circumstances.	(<u>Y</u>) <u>Yes</u> <u>No</u>
11b) If 11a is 'Y', enter the number of rule sections involved.	Number of at least Rule Section(s): <u>1</u>
12) Are the frequencies or parameters requested in this filing covered by grandfathered privileges, previously approved by waiver, or functionally integrated with an existing station?	(<u>N</u>) <u>Yes</u> <u>No</u>

Applicant Information

13) FCC Registration Number (FRN):

0014964985

14) Applicant/Licensee Legal Entity Type: (Select One)

 Individual (Unincorporated Association (Trust (Government Entity (Corporation (Limited Liability Company
 General Partnership (Limited Partnership (Limited Liability Partnership (Consortium
(Other:

15) If the Licensee name is being updated, is the update a result from the sale (or transfer of control) of the license(s) to another party and for which proper Commission approval has not been received or proper notification not provided?

(Yes No

16) First Name (if individual):

MI:

Last Name:

Suffix:

17) Legal Entity Name (if other than individual):

M2Z Networks, Inc.

18) Attention To:

Uzoma Onyeije

19) P.O. Box:

And/Or

20) Street Address:

2000 North 14th Street, Suite 600

21) City:

Arlington

22) State:

VA

23) Zip Code:

22201

(703) 894-9500

26) E-Mail Address:

uonyeije@m2znetworks.com

27) Demographics (Optional):

Race:

(American Indian or Alaska Native(Asian(Black or African-American(Native Hawaiian or Other Pacific Islander(White

Ethnicity:

(Hispanic or Latino(Not Hispanic or Latino

Gender:

(Male(Female

Real Party in Interest

28) Name of Real Party in Interest of Applicant (if different from Applicant):

29) FCC Registration Number (FRN) of Real Party in Interest:

30) First Name:

Pantelis

MI:

Last Name:

Michalopoulos

Suffix:

Address:

/Or

1330 Connecticut Avenue, NW

35) City:

Washington

36) State:

DC

37) Zip code:

20036

38) Telephone Number:

(202) 429-6494

39) FAX:

40) E-Mail Address:

pmichalo@steptoe.com

Regulatory Status

41) This filing is for authorization to provide or use the following type(s) of radio service offering (enter all that apply):
 Common Carrier Non-Common Carrier Private, Internal communications Broadcast Services Band Manager

Type of Radio Service

42) This filing is for authorization to provide the following type(s) of radio service (choose all that apply):
 Fixed Mobile Radiolocation Satellite (sound) Broadcast Services

43) Does the Applicant propose to provide service interconnected to the public telephone network? Yes No

Alien Ownership Questions (If any answer is 'Y', provide an attachment explaining the circumstances)

44) Is the Applicant a foreign government or the representative of any foreign government? Yes No

45) Is the Applicant an alien or the representative of an alien? Yes No

46) Is the Applicant a corporation organized under the laws of any foreign government? Yes No

47) Is the Applicant a corporation of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country? Yes No

48a) Is the Applicant directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country? Yes No

48b) If the answer to 48a is 'Y', has the Applicant received a ruling(s) under Section 310(b)(4) of the Communications Act with respect to the same radio service(s) and geographic coverage area(s) involved in this filing? Yes No

If the answer to 48b is 'Y', attach an exhibit that identifies the citation(s) of the applicable declaratory ruling(s) by DA/FCC number of the FCC Record citation, if available, release date, and any other identifying information

If the answer to 48b is 'N', attach to this filing a date-stamped copy of a request for a foreign ownership ruling pursuant to Section 310(b) (4) of the Communications Act.

Basic Qualification Questions

49) Has the Applicant or any party to this application had any FCC station authorization, license or construction permit revoked or had any application for an initial, modification or renewal of FCC station authorization, license, or construction permit denied by the Commission? Yes No

50) Has the Applicant or any party to this application, or any party directly or indirectly controlling the Applicant, ever been convicted of a felony by any state or federal court? Yes No

51) Has any court finally adjudged the Applicant or any party directly or indirectly controlling the Applicant guilty of unlawfully monopolizing or attempting unlawfully to monopolize radio communication, directly or indirectly, through control of manufacture or sale of radio apparatus, exclusive traffic arrangement, or any other means or unfair methods of competition? Yes No

If the answer to any of 49-51 is 'Y', attach an exhibit explaining the circumstances.

Aeronautical Advisory Station (Unicom) Certification

52) I certify that the station will be located on property of the airport to be served, and, in cases where the airport does not have a control tower, RCO, or FAA flight service station, that I have notified the owner of the airport and all aviation service organizations located at the airport within ten days prior to application.

Broadband Radio Service and Educational Broadband Service Cable Cross-Ownership

53a) Will the requested facilities be used to provide multichannel video programming service? Yes No

53b) If the answer to question 53a is 'Y', does Applicant operate, control or have an attributable interest (as defined in Section 27.1202 of the Commission's Rules) in a cable television system whose franchise area is located within the geographic service area of the requested facilities? Yes No

Note: If the answer to question 53b is 'Y', attach an exhibit explaining how the Applicant complies with Section 27.1202 of the Commission's Rules or justifying a waiver of that rule. If a waiver of the Commission Rule(s) is being requested, Item 11a must be answered 'Y'.

Broadband Radio Service and Educational Broadband Service (Part 27)

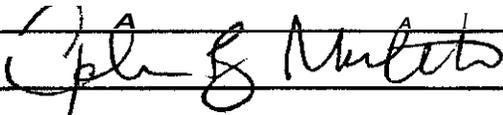
54) (For EBS only) Does the Applicant comply with the programming requirements contained in Section 27.1203 of the Commission's Rules? Yes No

Note: If the answer to item 54 is 'N', attach an exhibit explaining how the Applicant complies with Section 27.1203 of the Commission's Rules or justifying a waiver of that rule. If a waiver of the Commission Rule(s) is being requested, Item 11a must be answered 'Y'.

55) (For BRS and EBS) Does the Applicant comply with Sections 27.50, 27.55, and 27.1221 of the Commission's Rules? Yes No

Not.: If the answer to item 55 1a 'N', attach an exhibit justifying a waiver of that rule(s). If a waiver of the Commission Rule(s) is being requested, Item H a must be answered 'Y'.

- FEDERAL COMMUNICATIONS COMMISSION**
- 1) The Applicant waives any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests an authorization in accordance with this application.
 - 2) The Applicant certifies that grant of this application would not cause the Applicant to be in violation of any pertinent cross-ownership or attribution rules.*
*If the Applicant has sought a waiver of any such rule in connection with this application, it may make this certification subject to the outcome of the waiver request.
 - 3) The Applicant certifies that all statements made in this application and in the exhibits, attachments, or documents incorporated by reference are material, are part of this application, and are true, complete, correct, and made in good faith.
 - 4) The Applicant certifies that neither the Applicant nor any other party to the application is subject to a denial of Federal benefits pursuant to §5301 of the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 882, because of a conviction for possession or distribution of a controlled substance. This certification does not apply to applications filed in services exempted under §1.2002(c) of the rules, 47 CFR § 1.2002(c). See §1.2002(b) of the rules, 47 CFR § 1.2002(b), for the definition of "party to the application" as used in this certification.
 - 5) The Applicant certifies that it either (1) has current required ownership data on file with the Commission, (2) is filing updated ownership data simultaneously with this application, or (3) is not required to file ownership data under the Commission's Rules.
 - 6) The Applicant certifies that the facilities, operations, and transmitters for which this authorization is hereby requested are either: (1) categorically excluded from routine environmental evaluation for RF exposure as set forth in 47 C.F.R. 1.1307(b); or, (2) have been found not to cause human exposure to levels of radiofrequency radiation in excess of the limits specified in 47 C.F.R. 1.1310 and 2.1093; or, (3) are the subject of one or more Environmental Assessments filed with the Commission.
 - 7) The Applicant certifies that it has reviewed the appropriate Commission Rules defining eligibility to hold the requested license(s), and is eligible to hold the requested license(s).
 - 8) The Applicant certifies that it is not in default on any payment for Commission licenses and that it is not delinquent on any non-tax debt owed to any federal agency.

First Name: John	MI:	Last Name: Muleta	Suffix:
Signature: 		58) Date: May 4, 2006	
FAILURE TO SIGN THIS APPLICATION MAY RESULT IN DISMISSAL OF THE APPLICATION AND FORFEITURE OF ANY FEES PAID.			
Upon grant of this license application, the Licensee may be subject to certain construction or coverage requirements. Failure to meet the construction or coverage requirements will result in termination of the license. Consult appropriate FCC regulations to determine the construction or coverage requirements that apply to the type of license requested in this application.			
WILLFUL FALSE STATEMENTS MADE ON THIS FORM OR ANY ATTACHMENTS ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT (U.S. Code, Title 18, §1001) AND/OR REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT (U.S. Code, Title 47, §312(a)(1)), AND/OR FORFEITURE (U.S. Code, Title 47, §503).			

CERTIFICATE OF SERVICE

I, Linda J. Evans, a secretary in the law office of Lukas, Nace, Gutierrez & Sachs, Chartered, hereby certify that I have, on this 30th day of March, 2007, caused to be mailed, postage pre-paid, a copy of the foregoing Petition for Reconsideration to the following:

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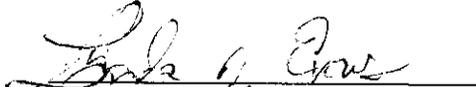
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